

**Yap Meei Shiang v
Yap Long Chiew & Ors**

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-291 OF 1998
KAMALANATHAN RATNAM J
12 MAY 1999

Civil Procedure — Pleadings — Striking out writ and statement of claim, application for — Application a waste of judicial time — Allegations which can only be ascertained after hearing of evidence — Whether application should be dismissed

The plaintiff had transferred a parcel of land to the second defendant, allegedly upon the representation of her older brother, the first defendant, that he would develop the land at his own cost and expense. A trust deed was executed declaring that the second defendant would hold the plaintiff's land as trustee for the plaintiff and that the land would be re-transferred to her upon completion of the development. The second defendant, under a joint venture with the third defendant, developed the land as part of a housing development scheme. In the later part of 1994, the plaintiff was informed that the cost of developing her land would not be borne by the first or second defendant and, in 1997, it was insisted that the plaintiff was only entitled to 30% of the nine apartment units developed on her land. The plaintiff's demand for the land to be re-transferred to her was refused and consequently an action was taken against the defendants. The defendants applied to have the plaintiff's writ and statement of claim struck out under O 18 r 19(1)(b) of the Rules of the High Court 1980. The application was dismissed by the deputy registrar. The first defendant appealed, contending that as a director of the second defendant, he was merely acting as an agent of the second defendant in any negotiations with the plaintiff in respect of the development of the plaintiff's land and that he cannot be held personally liable for any alleged breach of trust.

Held, dismissing the appeal with costs:

The application to strike out and the consequential appeal are a pure waste of judicial time. There are allegations which can only be ascertained after hearing the evidence of the respective parties. The plaintiff's action against the first defendant cannot be said to be frivolous or vexatious nor obviously unsustainable (see p 649 F-I).

[Bahasa Malaysia summary]

Plaintif telah memindahkan sebidang tanah kepada defendan kedua, yang dikatakan atas representasi abangnya, yang merupakan defendan pertama, bahawa beliau akan membangunkan tanah tersebut atas kos dan perbelanjaannya sendiri. Satu surat ikatan amanah telah disempurnakan yang mengisytiharkan bahawa defendan kedua akan memegang tanah plaintif sebagai pemegang amanah bagi plaintif dan bahawa tanah tersebut akan dipindahkan semula kepadanya setelah tamat pembangunan tersebut. Defendan kedua, di bawah suatu

- A** usahasama dengan defendan ketiga, telah memajukan tanah tersebut sebagai suatu skim kemajuan perumahan. Pada hampir penghujung tahun 1994, plaintif telah dimaklumkan bahawa kos memajukan tanahnya tidak akan ditanggung oleh defendan pertama atau kedua dan pada tahun 1997, adalah digesa bahawa plaintif hanya berhak kepada 30% daripada sembilan unit pangsapuri yang dimajukan atas tanahnya itu. Tuntutan plaintif supaya tanah tersebut dipindahmilik semula kepadanya telah ditolak dan akibatnya satu tindakan telah diambil terhadap defendan-defendan. Defendan-defendan telah memohon supaya writ dan pernyataan tuntutan plaintif dibatalkan di bawah A 18 K 19(1)(b) Kaedah-Kaedah Mahkamah Tinggi 1980.
- B** Permohonan tersebut telah ditolak oleh timbalan pendaftar.
- C** Defendan pertama telah merayu, dengan menegaskan bahawa sebagai pengarah defendan kedua, beliau hanya bertindak sebagai ejen defendan kedua dalam apa-apa perundingan dengan plaintif berhubung pembangunan tanah plaintif dan bahawa beliau tidak boleh dipertanggungjawabkan secara peribadi bagi sebarang pecah amanah yang dikatakan tersebut.
- D**

Diputuskan, menolak rayuan dengan kos:

- Permohonan untuk membatalkan dan rayuan yang berbangkit tersebut adalah semata-mata membuang masa kehakiman. Terdapat dakwaan-dakwaan yang mana hanya boleh ditentukan selepas mendengar keterangan pihak-pihak yang berkenaan. Tindakan plaintif terhadap defendan pertama tidak boleh dikatakan sebagai remeh dan menyusahkan mahupun dengan ketaranya tidak boleh dipertahankan (lihat ms 649 F-I).]
- E**

F

Notes

For cases on an application for the striking out of writ and statement of claim, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3805–3809.

G

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd
[1993] 3 MLJ 36 (refd)

H

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(b)

Cur Adv Vult

I

Kamalanathan Ratnam J:

Facts

The plaintiff was the registered owner of a parcel of housing land measuring approximately 305.92 square meters ('the plaintiff's land'). The plaintiff's

land was part of a housing development scheme known as Taman Sri Kucing ('the housing development scheme').

A

The plaintiff's land was given to her by her deceased father, Yap Kyah Cheong. The first defendant is an older brother of the plaintiff. The first defendant and his family members hold all the shares in the second defendant. The second defendant was the proprietor of the majority of the housing lots in the housing development scheme. The second defendant's land was originally given to the first defendant who later transferred it to the second defendant. The deceased father had instructed the first defendant to develop the plaintiff's land for the plaintiff at the first defendant's own costs.

B

Case for the plaintiff

C

On or about October/November 1992, the first defendant represented to the plaintiff that he would develop the plaintiff's land for her at his own costs and to facilitate the said development, the plaintiff was to transfer the plaintiff's land to the second defendant. Based on the relationship of trust and confidence between the plaintiff and the first defendant and induced by the representations, the plaintiff transferred the plaintiff's land to the second defendant.

D

The second defendant then executed a trust deed wherein the second defendant declared that the second defendant would hold the plaintiff's land as trustee for the plaintiff and that the second defendant would re-transfer the plaintiff's land to the plaintiff upon the completion of the development and issuance of individual titles. The second defendant later entered into a joint venture agreement with the third defendant to carry out the development. In the later part of 1994 the second defendant informed the plaintiff that neither the first defendant nor the second defendant would bear the cost of developing the plaintiff's land. The third defendant continued with the construction of nine units of apartment on the plaintiff's land.

E

F

In August 1997 the second defendant transferred the plaintiff's land to the third defendant without the plaintiff's knowledge or consent. In December 1997, the second defendant insisted that the plaintiff was only entitled to 30% of the nine units of apartment. This was rejected by the plaintiff. Despite the plaintiff's demands the second and third defendants have failed or refused to re-transfer the plaintiff's land to the plaintiff.

G

The first defendant did not make any express denial that he had made the representations to the plaintiff.

H

Case for the first defendant

The first defendant's affidavits (encls 13 and 17) could be summarized as follows:

- (i) The first defendant is a director of the second defendant.
- (ii) The first defendant was acting as an agent of the second defendant in all the negotiations with the plaintiff on the development of the plaintiff's land.

I

- A (iii) The first defendant is not a party to the trust deed executed by the second defendant.
- (iv) Therefore, the first defendant is not personally liable to the plaintiff for the second defendant's alleged breach of trust.

The first defendant raised three issues for the court to consider:

- B (1) Did the late father of the plaintiff and the first defendant give any instructions to the first defendant in respect of the development of the plaintiff's land?
- (2) Did the first defendant promise the plaintiff that he would develop the plaintiff's land at his cost and expense?
- C (3) Can these issues be dealt with in summary proceedings?

The application

- D The defendants thus applied to strike out the plaintiff's writ and statement of claim under O 18 r 19(1)(b) of the Rules of the High Court 1980. The same was dismissed by the Deputy Registrar. Hence this appeal before me.

Findings of the court

- E In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 at p 43, the then Supreme Court said:

- F The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' ...

- G It is my judgment that both this application to strike out and the consequential appeal are a pure waste of judicial time. It is my finding that the statement of claim discloses a clear cause of action against the first defendant. There are allegations that the first defendant made representations to the plaintiff offering to develop the plaintiff's land for the plaintiff at the first defendant's own cost. Whether this is true or not can only be ascertained after hearing the evidence of the respective parties. In any case the plaintiff contends that based on the said representations she transferred her land to the second defendant as requested by the first defendant.
- H There is no denying the fact of transfer. The plaintiff now contends that the first defendant has breached his promise to the plaintiff that he would bear the costs of developing the plaintiff's land. These allegations of the plaintiff are affirmed under oath.

- I To my mind based on the averments in the pleadings and in the affidavits, the plaintiff's action against the first defendant cannot be said to be frivolous or vexatious nor can it be said that the plaintiff's claim is obviously unsustainable.

The first defendant contends that since he was a director of the second defendant, he was merely acting as an agent of the second defendant in all

the negotiations with the plaintiff in respect of the development of the plaintiff's land and that since he, the first defendant is not a party to the trust deed executed by the second defendant he cannot therefore be personally liable to the plaintiff for the second defendant's alleged breach of trust. But surely these are matters that must be subjected to the acid test of cross-examination. This is all the more relevant, considering the fact that the shares in the second defendant are all held by the first defendant's family, with the first defendant holding 50% of the shares and the first defendant being the contributor of all the capital assets in the second defendant.

As for the three issues posed by the first defendant, the very fact that the first defendant himself has raised these issues, clearly shows that this is not a fit and proper case to accede to the first defendant's request to strike out the plaintiff's claim. The issues raised, especially the first two, would rest upon the court's assessment of the credibility of the parties through oral evidence in court and that is why I said at the outset that this application to strike out is made with scant thought given to its merit. I therefore dismiss this appeal with costs.

Appeal dismissed with costs.

Reported by Joel Ng

A
B
C
D
E
F
G
H
I